BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRIS A. SUMNER, DECEASED	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,008,450
MEIER'S READY MIX, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH U.S. INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the May 4, 2004 Award of Administrative Law Judge Bryce D. Benedict. Decedent's surviving spouse was awarded benefits after decedent was killed in a motor vehicle accident on September 30, 2002, which the Administrative Law Judge held arose out of and in the course of his employment with respondent. The Appeals Board (Board) heard oral argument on September 21, 2004.

APPEARANCES

Decedent's surviving spouse (hereinafter referred to as "claimant") appeared by her attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. The Board notes that the parties have stipulated that the errand undertaken by decedent when he deviated from his I-70 route, turning south on K-177, heading for Council Grove, Kansas, on September 30, 2002, was a purely personal errand with no business purpose. Additionally, respondent acknowledged at oral argument before the Board that if the decedent was going home to stay, with no intention of returning with his load to Junction City, Kansas, until the next day, then the injury would be compensable.

ISSUES

Did decedent, Chris A. Sumner, suffer accidental injury arising out of and in the course of his employment with respondent? More particularly, did decedent's deviation from his I-70 west route, when he turned south on K-177 for a personal errand, constitute a substantial deviation from his employment? Additionally, was decedent intending to return to Junction City with his flatbed load of bagged and palletized cement or was he intending to remain overnight at Council Grove and deliver the load the next morning?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be reversed.

The decedent, Chris A. Sumner, a truck driver for respondent, lived in Council Grove, Kansas, and maintained his semitrailer and flatbed truck at his residence with the permission of the employer. Decedent would drive his truck home every night, whether it was full or empty. If decedent's truck was full when he arrived at home, he would deliver the load the next morning.

On the date of the accident, decedent left Council Grove at approximately 3:00 a.m., which was his normal departure time. The evidence indicates that decedent's truck was empty at that time. Decedent apparently obtained a load from one of respondent's processing plants, delivering the load to Emporia, Kansas, at approximately 7:00 a.m. Decedent was then instructed to proceed to the respondent's Sugar Creek production plant and obtain another load. Upon arrival at the Sugar Creek plant, decedent was advised that Eric Schneider, respondent's assistant manager, had requested the first two drivers to arrive at Sugar Creek to proceed to Junction City with a load. Decedent obtained the load and headed for Junction City, traveling west on I-70.

At approximately noon, decedent advised Mr. Schneider that he had an emergency at home that he had to take care of. Mr. Schneider testified that decedent sounded excited and perhaps upset during the conversation. Mr. Schneider gave permission for decedent to travel to his home, but it was agreed that decedent would then deliver his load to Junction City, Kansas. Mr. Schneider did, however, testify that if decedent was pushing or exceeding the normal 12-hour shift time limit, that it would be acceptable for decedent to maintain the load at Council Grove, delivering it the next morning, although again Mr. Schneider testified that it was his intent that decedent would deliver the load to Junction City that day if at all possible.

Decedent proceeded west on I-70, turning south on K-177 south of Manhattan, proceeding to Council Grove. As noted above, the parties stipulated decedent's deviation

southward on K-177 was a purely personal errand with no business-related purpose. Had decedent not been involved in the personal deviation, he would have continued west on I-70, delivering the load to Junction City, which is approximately 15 miles west of where he turned south. The parties stipulated at oral argument that there was no evidence regarding the nature of the personal errand. There was also no indication in the record as to how long this emergency would take to resolve. However, information in the record indicates decedent's mother-in-law had died approximately two weeks before decedent's accident and that there had been some concerns or problems at home resulting from this death. Whether decedent's deviation on the date of accident was related to that incident or not is unknown.

While proceeding south on K-177, decedent was involved in a single vehicle accident approximately 15 miles south of the intersection of I-70 and K-177. This accident, which occurred just north of the Geary/Morris County line, approximately 13 miles north of Council Grove, resulted in decedent's death.

Eric Schneider, respondent's assistant manager, testified that he believed decedent left his residence at approximately 3:00 a.m. that morning and that a normal day for their drivers would be 12 hours. He did testify that occasionally the drivers would exceed that 12-hour limit, but usually by not more than an hour. He also testified that decedent was not the only driver to encounter occasional emergencies and that respondent was flexible in that regard.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1] K.S.A. 44-501(a) states, in part:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.
>
> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or

[1] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

> after leaving such duties, the proximate cause of which injury is not the employer's negligence.[2]

An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends on the facts peculiar to the particular case.[4]

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.,* have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

In this instance, decedent had not concluded his regular job duties for respondent. It is uncontradicted that it was respondent's wish that decedent return the load to Junction City if at all possible. However, it was also admitted by a respondent representative that if decedent was exceeding his hours, for him to maintain the load at his residence in Council Grove and deliver it the next morning would have been acceptable, although not preferable.

> It never was the purpose of the compensation act that the employer should in all respects be an insurer of the employee, but he is such insurer only for those accidental injuries caused or produced in some way by the employment.[6]

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[2] K.S.A. 2002 Supp. 44-508(f).

[3] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

[4] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[6] *Rush v. Empire Oil & Refining Co.*, 140 Kan. 198, 34 P.2d 542 (1934).

Respondent contends that decedent's deviation from his route was substantially sufficient to constitute a major deviation and should bar recovery. The Kansas Supreme Court, in *Kindel*,[7] deals specifically with substantial deviations. In *Kindel*, the deceased and his supervisor stopped at a bar on their way home to Salina, Kansas. The bar was on the west side of Topeka, Kansas. The deceased and his supervisor left their employment sometime after 3:30 p.m., going to the Outer Limits bar, where they became inebriated. The supervisor, Graham, was driving the truck when they left the bar. At approximately 8:50 p.m., the Kansas Highway Patrol was notified of an accident on I-70, mile marker 337. Graham, the supervisor, was driving the company's truck. The deceased, Kindel, had been partially ejected from the truck. Both Graham and Kindel had blood alcohol levels of .225 and .26 respectively. The court, in *Kindel*, awarded benefits to the deceased's family, finding that while there had been a substantial deviation, in *Kindel*, the deviation had been terminated and both Graham and Kindel had resumed the route home at the time of the accident.

The court, in *Kindel*, citing *Calloway,*[8] stated:

> In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he has ceased the deviation and is returning to the business route or purpose.

In this instance, the parties have stipulated that decedent's decision to turn south on K-177 was purely personal, with no business purpose whatsoever. The Board, therefore, finds that this was a substantial deviation from respondent's business purpose.

Claimant, however, argues that the decision to turn south on the date of accident had a dual purpose. Claimant acknowledges that this was a purely personal trip. However, claimant also argues that the decedent's trip south was the final trip for the day, with the decedent having no intention of returning to Junction City with the load until the next morning. While the Board understands that argument, the Board notes there is no evidence in the record to verify the purpose for the trip, other than the stipulation that it was personal. How long the decedent intended to stay in Council Grove cannot be determined from this record.

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for

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[7] *Kindel, supra.*

[8] *Calloway v. Workmen's Comp.*, 165 W. Va. 432, 268 S.E. 2d 132 (1980).

> the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. . . .[9]

Accidental injuries which occur on dual purpose excursions, where the benefit is both to the employer and the employee, are generally ruled compensable.[10] However, the dual purpose rule does not extend to factual situations where the errand would not have been undertaken if the personal errand had been abandoned or postponed.[11] In this instance, the trip south was purely personal. The portion of the trip which was work related would have required that claimant remain on I-70, heading west to Junction City.

Claimant argues that the decedent was traveling to Council Grove with the intention of remaining there only to deliver the load the next morning. Unfortunately, the record is not clear on that issue. Mr. Schneider testified that he advised decedent that if at all possible, he would like the load delivered that afternoon. He acknowledged that if the load were delivered the next morning, due to decedent exceeding his normal work day, that would be acceptable to respondent. In this instance, since the record does not discuss the specific purpose of this personal trip, there is no way to ascertain how long decedent would have been in Council Grove and whether he would have had time that afternoon to deliver the load to Junction City as originally planned. The Board, therefore, cannot hold that there was a dual purpose to this deviation. The Board finds that the trip by the decedent was, as stipulated, a purely personal trip, with no proven benefit to the employer.

Claimant finally argues that decedent, in effect, was on duty at all times, since he was responsible for both the vehicle and the load.[12] However, claimant's counsel fails to provide any legal support for that argument. The Board finds that even though decedent was in a vehicle belonging to respondent, the excursion onto K-177 was a purely personal errand for decedent's benefit.

Finally, claimant's attorney argues that the fact that the decedent was driving a big trailer rig subjected the driver to greater risk of serious injury than would a normal automobile or pickup truck. The Board acknowledges that Kansas has long recognized a special hazard or special risk exception to the going and coming rule.[13] However, the

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[9] *Tompkins v. Rinner Construction Co.*, 194 Kan. 278, 398 P.2d 578 (1965); Vol. 1, Larson, Workmen's Compensation Law, § 18.0.

[10] 1 Larson's Workers' Compensation Law § 16 (2003).

[11] *Tompkins, supra.*

[12] *Angleton v. Starkan, Inc.*, 250 Kan. 711, 828 P.2d 933 (1992).

[13] K.S.A. 2002 Supp. 44-508(f).

Kansas courts have never held that the mere act of driving a semitrailer truck constitutes a special risk or hazard which would fall within that exception. To do so would allow every accident involving a tractor trailer rig to fall under the control of the Kansas Workers Compensation Act, which the Board finds was not the intent and purpose of the legislature.

The Board, although reluctantly, finds based upon the evidence in this record, that the decedent, Chris A. Sumner, was not acting out of and in the course of his employment at the time of the accident on K-177, but was, instead, involved in a personal errand and had substantially deviated from his employment with respondent. The Board, therefore, finds that the Administrative Law Judge's award of benefits in this matter is inappropriate and should be reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 4, 2004, should be, and is hereby, reversed, and an award of benefits to claimant, spouse of decedent Chris A. Sumner, should be, and is hereby, denied.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority's decision. As indicated above, respondent acknowledged at oral argument that if the decedent was on his way home to stay overnight, the accident would be compensable under the Kansas Workers

Compensation Act. We agree with the ALJ that it is more probably true than not that the decedent was headed home for the day when the fatal accident occurred. Accordingly, the September 30, 2002 accident is compensable and the May 4, 2004 Award should be affirmed.

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director